90-1915

No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

REX H. REED,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

JERRY M. HUNTER, GENERAL COUNSEL,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

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June 13, 1991

QUESTIONS PRESENTED FOR REVIEW

Are lists of the names and addresses of private-sector employees, which a Federal agency requires private-sector employers to compile and furnish to the agency for distribution to private-sector labor organizations, properly exempt from disclosure under Exemption 6 of the Freedom of Information Act, 5 U.S.C. § 552(b)(6), where:

- the permission of employees to have their names and addresses included on the lists is not obtained by the employer which compiles or by the agency which distributes them;

- the lists are obtained and distributed by the agency with no pledge of confidentiality to, or waiver of privacy by, listed employees;

- the agency requires compilation of the lists and then distributes them, contemplating that the names and addresses of the employees will be used by the labor organization recipient for precisely the same "invasions of privacy" the agency claims justify nondisclosure under Exemption 6;

- the agency distributing the lists does not limit the labor organizations' use or the dissemination of the lists to others; and where

- the person making the FOIA request has shown that the names and addresses will materially assist in demonstrating the impact of the policies of the agency upon employees' statutory rights?

PARTIES TO THE PROCEEDING BELOW

The caption of this petition lists all the parties who participated in petitioner's appeal to the United States Court of Appeals for the District of Columbia Circuit, the order of which is sought to be reviewed here.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTRODUCTION

The petitioner, Rex H. Reed ("Reed"), respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the March 15, 1991 order affirming summary judgment against Reed's claims that the National Labor Relations Board and Jerry M. Hunter, in his official capacity as NLRB General Counsel (collectively

"NLRB" or "Agency"), are required to produce *Excelsior* lists[1] under the Freedom of Information Act ("FOIA"),[2] and affirming dismissal of his complaint.

OPINIONS BELOW

The order of the District Court of May 15, 1990, dismissing Reed's complaint and granting summary judgment in favor of the NLRB, is unofficially reported as *Reed v. NLRB*, 136 L.R.R.M. (BNA) 2045, and is reproduced in the Appendix ("App. ___") at 7a. The opinion and order of the United States Court of Appeals for the District of Columbia Circuit, dated March 15, 1991, are reported at 927 F.2d 1249, and are reproduced at App. 1a.

JURISDICTION

The Court of Appeals entered its opinion and order on March 15, 1991. This petition is filed within ninety days of that opinion as prescribed by this Court's Rule 13.1, and is authorized by 28 U.S.C. § 1254(1).

Jurisdiction as the predicate for the issues raised by this petition, is invoked under the FOIA, 5 U.S.C. § 552(a)(4)(B).

STATUTORY PROVISIONS AND AGENCY PRACTICES AND PROCEDURES INVOLVED

Statutory Provisions:

Reed's request for production of names and addresses on lists compiled at the direction of and distributed by the NLRB is made under the FOIA, 5 U.S.C. § 552. The NLRB asserts, and

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[1] *Excelsior* lists are described in more detail *infra*.

[2] 5 U.S.C. § 552.

the courts below found, that those lists are exempt from production under FOIA § 552(b)(6) ("Exemption 6"). As pertinent, the FOIA and Exemption 6 state:

> **§ 552. Public information; agency rules, opinions, orders, records, and proceedings**
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> * * * *
>
> (b) This section does not apply to matters that are—
>
> * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Practices and Procedures:

Practices and procedures concerning the *Excelsior* list requirements are contained in the NLRB's Casehandling Manual ("Manual"). The Manual is not a rule or regulation within the Administrative Procedure Act. *Excelsior* practices and procedures however, are contained in the record through the Stipulation of the Parties, which appears at App. 10a.

STATEMENT OF THE CASE

LITIGATION HISTORY

Before the Agency

Reed made written request[3] under the FOIA's disclosure provisions that the NLRB produce lists of employees participating in representation elections the NLRB conducts under § 9 of the National Labor Relations Act ("NLRA"),[4] so-called "*Excelsior* lists."[5] The request was confined to elections conducted in "those states not having Right-to-Work laws and elections where [the] Union won."[6] The NLRB denied the request.[7] Reed appealed to the then Acting NLRB General Counsel.[8] Reed's administrative appeal was denied.[9]

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[3] Letter of Hugh L. Reilly to John C. Truesdale, Executive Secretary of the NLRB, dated August 3, 1989. (App. 17a)

[4] 29 U.S.C. § 159. These elections are detailed in the Stipulation of the Parties ("Stipulation" or "Stip."), ¶ 2, App. 10a.

[5] "*Excelsior* lists" are named after the NLRB case that requires employers participating in NLRB conducted elections to compile lists of employees eligible to vote, and to provide those lists to unions seeking to represent those employees.

[6] *Supra* n.3.

[7] Letter of John W. Hornbeck, NLRB Freedom of Information Officer, to Hugh L. Reilly, dated August 25, 1989. (App. 19a)

[8] Letter to Joseph E. DeSio from Hugh L. Reilly, dated September 14, 1989. (App. 24a)

[9] Letter to Hugh L. Reilly from Mary M. Shanklin, Director of the NLRB General Counsel's Office of Appeals, dated September 28, 1989. (App. 28a)

Before the District Court

Denied access to the *Excelsior* lists, Reed filed a complaint[10] in the United States District Court for the District of Columbia on December 4, 1989. The NLRB filed an answer.[11] Pursuant to a scheduling order entered by the trial judge,[12] the parties filed a stipulation of facts[13] and then cross-motions for summary judgment.[14] The District Court entered an order on May 15, 1990,[15] concluding that Reed's request had no basis in the FOIA's purposes and that the manner in which *Excelsior* lists are compiled and distributed does not impair the NLRB's Exemption 6 defense. And, because, in its view, the *Excelsior* lists shed no light on "what the NLRB is up to,"[16] the court granted the NLRB summary judgment under Exemption 6.

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[10] App. 14a.

[11] App. 30a.

[12] The scheduling order is District Court Document 5.

[13] App. 10a.

[14] Reed's Motion for Summary Judgment and Supporting Points and Authorities appears at App. 38a; [The NLRB] Defendants' Motion for Summary Judgment appears at App. 34a; and Reply Memorandum of Points and Authorities of the National Labor Relations Board to the Cross-Motion for Summary Judgment appears at App. 40a. (The first and last pages both of the motions and the reply are reprinted to confirm their filing in District Court, but the parties' arguments are omitted.)

[15] App. 7a.

[16] App. at 9a.

Before the Court of Appeals

The Court of Appeals affirmed the District Court's decision, concluding that: "The *Excelsior* lists at issue here contain exclusively private information and would reveal nothing about the Board's conduct of representation proceedings or its performance of any other statutory duty."[17] Like the District Court, the Court of Appeals inaccurately constricts Reed's position to contending that: "the NLRB's prior disclosure of *Excelsior* lists to unions during representation proceedings and the Board's failure to place restrictions on the unions' use of the lists undermine the significance of the individuals' asserted privacy interests."[18] And, like the District Court, the Court of Appeals does not address Reed's additional contentions that the *Excelsior* listed employees receive no pledge of confidentiality, and that the *Excelsior* lists are compiled and distributed with precisely the same "invasions of privacy" in mind that the NLRB claims warrant nondisclosure under Exemption 6. Upon those views, the Court of Appeals went beyond the District Court, concluding that: "Exemption 6 protects *Excelsior* lists as a category—not merely those lists sought here by Reed."[19]

Stipulated Facts

The facts pertinent to this case are not in dispute; they are stipulated. They form the heart of Reed's petition. Because of the central importance of the stipulated facts to the disposition of the petition, we here set forth those facts as they appear in the Appendix at 10a-12a. We then summarize those facts Reed believes are controlling. The Stipulation of the Parties contains the following facts:

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[17] App. at 5a.

[18] App. at 4a.

[19] App. at 5a.

1) The [NLRB is] an agency of the Federal government within the meaning of the Freedom of Information Act, 5 U.S.C Section 552 et seq.

2) The [NLRB] is created by the National Labor Relations Act ("Act"), 29 U.S.C section 151 et seq. to, among other things, administer the election provisions of the Act (29 U.S.C. 159), under which employee interest in representation by a labor organization (certification elections), continued representation by the incumbent certified or recognized labor organization (decertification elections), and the labor organization's right to continue to collect representation fees under a "union security" arrangement (deauthorization elections) are determined by employees' vote in secret ballot elections conducted by the NLRB.

3) In administering the election provisions of the Act, the NLRB has delegated the conduct of representation matters, including elections, to the General Counsel, also a [respondent] herein. Generally, in accordance with Board Rules and Regulations (29 C.F.R. 102.60) representation petitions for elections are filed in the appropriate Board Regional Office. In accordance with the Act (29 U.S.C. 3(d)), the General Counsel exercises general supervision over the officers and employees in the Board's Regional Offices.

4) Generally, after the Agency directs an election or approves an election agreement, the Board's *Excelsior* rule takes effect. . . . The *Excelsior* rule requires that the employer of the petitioned-for unit prepare an election eligibility list containing the names and addresses of all eligible voters. The names and addresses should be listed systematically, i.e. either alphabetically or by department or unit. The employer must file the list with the Regional Director within seven days of the direction or approval. The Regional Director then makes this list available to all parties

in the election proceeding. This list will normally be used as the voting list, unless the parties agree on changes in resolving eligibility issues.

5) The purpose of the *Excelsior* list is to facilitate communication in order to insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote. The *Excelsior* list is also designed to avoid the necessity of a challenge to a voter based solely on the union's lack of knowledge of his/her identity.

6) As the Act is administered for purposes of elections:

A) Eligible employees are not given individual notice that their names and addresses are being furnished to the NLRB and then to the labor organization(s). However, notice of the *Excelsior* rule's requirements is set forth in the Regional Director's Decision and Direction of Election and the Stipulated Election Agreement approved by the Regional Director, which are public documents.

B) Generally eligible employees cannot have their names and addresses deleted from the *Excelsior* list furnished to the Board and then to the labor organization(s).

C) The parties receive the *Excelsior* lists after the Decision and Direction of Election or after the approval of a Stipulated Election Agreement. Once the parties have the list, the [NLRB does] not limit the time, place, and manner within which the labor organizations can use the *Excelsior* lists to communicate with the employees.

D) Normally, the [NLRB does] not limit the subject matter concerning which the labor organizations can use the *Excelsior* lists to communicate with the employees. If, however, unfair labor practice charges or objections to an

election are filed, the [NLRB] may review the content of these communications.

E) The [NLRB does] not limit the number of copies the labor organization(s) can make of the *Excelsior* lists, nor do[es it] limit the labor organization(s)' distribution of the *Excelsior* lists.

F) The [NLRB] retain[s] custody of the original eligibility list. In accordance with its Casehandling Rules, the Agency does not at any time, once the *Excelsior* list has been distributed, seek the return of the *Excelsior* list from the labor organization(s) which were parties to the election. Nor does the Agency assist an employer in obtaining copies of the *Excelsior* list that may have been made.[20]

In summary, following are the facts Reed concludes are most pertinent to the proper disposition of the instant petition:

The [Agency's] Regional Director . . . *makes this list available to all parties in the election proceeding.*

* * * *

6) As the Act is administered for purposes of elections:

A) *Eligible employees are not given individual notice that their names and addresses are being furnished to the NLRB and then to the labor organization(s).* However, notice of the *Excelsior* rule's requirements is set forth in the Regional Director's Decision and Direction of Election and the Stipulated Election Agreement approved by the Regional Director, which are public documents.

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[20] We omit subsequent paragraphs of the stipulation which merely recite the procedural facts set forth in the Statement of the Case, *supra.*

B) Generally *eligible employees cannot have their names and addresses deleted from the Excelsior list furnished to the Board and then to the labor organization(s).*

C) The parties receive the *Excelsior* lists after the Decision and Direction of Election or after the approval of a Stipulated Election Agreement. *Once the parties have the list, the [Agency does] not limit the time, place, and manner within which the labor organizations can use the Excelsior lists to communicate with the employees.*

D) Normally * * * the [Agency does] not limit the subject matter concerning which the labor organizations can use the *Excelsior* lists to communicate with the employees.

E) The [Agency does] not limit the number of copies the labor organization(s) can make of the *Excelsior* lists, nor [does it] limit the labor organization(s)' distribution of the *Excelsior* lists.

F) The [Agency] retain[s] custody of the original eligibility list. In accordance with its Casehandling Rules, *the Agency does not at any time, once the* Excelsior *list has been distributed, seek the return of the* Excelsior *list from the labor organization(s) which were parties to the election. Nor does the Agency assist an employer in obtaining copies of the* Excelsior *list that may have been made.*[21]

SUMMARY OF ARGUMENT

Reed respectfully submits, upon these stipulated facts, that the practical question presented is: Can the NLRB refuse to produce names and addresses on *Excelsior* lists under the FOIA, on grounds of Exemption 6, popularly called the "privacy exemption," where the Agency obtains the names and addresses

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[21] Stip., ¶ 4, App. 11a & ¶ 6, A-F, App. 11a-12a (emphasis added).

with no pledge of confidentiality, has itself disclosed the names and addresses to certain members of the public (i.e., labor organizations) essentially without restriction, and where such disclosure is made for labor organizations to conduct "invasions of privacy" which are the equivalent to those which the NLRB claims justify nondisclosure under Exemption 6?[22] Reed submits that the decision below conflicts with this Court's decision in *United States Department of Justice v. Reporters Committee for Freedom of the Press*,[23] with the Eleventh Circuit's decision in *Ray v. United States Department of State*,[24] and with the language and purposes of the FOIA.

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[22] The NLRB's actions in this regard have known, and intended, adverse consequences for the "privacy interests" of individual employees. One very knowledgeable observer has given "*Suggestions to* [Union] *Organizers Based on Excelsior*" which include: "This planning [geared to the availability of employee names and addresses] should consider extensive house calls, phone contacts, and home mailing campaigns in addition to other organizing methods. . . . [W]hen an election is won, preserve the list. It can come in handy later. . . . [And,] [i]f an election is lost, again *preserve* the mailing list. It may be invaluable for a later campaign." S. Schlossberg & F. Sherman, ORGANIZING AND THE LAW 124-25 (1971).

[23] 109 S. Ct. 1468 (1989).

[24] 908 F.2d 1549 (11th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3598 (Mar. 4, 1991).

ARGUMENT

The Decision Below Conflicts With This Court's Decision In *Reporters Committee*

The latest, definitive construction by this Court of FOIA privacy exemptions[25] is found in *United States Department of Justice v. Reporters Committee for Freedom of the Press*.[26] In *Reporters Committee*, the FOIA requestor sought disclosure of criminal "rap sheets" of various individuals. These "rap sheets" contain "descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject."[27] The types of information contained on "rap sheets" as described by this Court are markedly more intrusive on personal privacy than the bare names and addresses contained on *Excelsior* lists sought here.

Nevertheless, *Reporters Committee* does provide clear authority requiring disclosure of *Excelsior* lists in the instant case. For, this Court's permitting nondisclosure under Exemption 7 in that case is specifically conditioned upon the existence of "the Department's basic policy of treating these records as confidential,"[28] with but one exception, that being that in certain

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[25] *Reporters Committee* concerns an interpretation of FOIA § 552(b)(7)(C) ("Exemption 7") which differs somewhat in its language from Exemption 6. Exemption 7 requires the agency resisting disclosure to show that disclosure would "constitute an unwarranted invasion of personal privacy"; whereas, Exemption 6 requires a showing that disclosure would "constitute a *clearly* unwarranted invasion of personal privacy" (emphasis added). Despite that difference, the courts and parties below consider *Reporters Committee* authoritative in the interpretation of Exemption 6, as Reed does here.

[26] 109 S. Ct. 1468 (1989).

[27] *Id.* at 1470.

[28] *Id.* at 1471.

circumstances the Department of Justice provides the "rap sheets" to other law enforcement arms *of government*. But even that exception is subject to "cancellation *if dissemination is made outside the receiving departments or related agencies.*"[29]

Reporters Committee, then, addresses a situation in which no disclosure had been made to *private* organizations, but solely to *public* law enforcement agencies. The heavy reliance that decision places upon the fact that the governmental inter-agency sharing of "rap sheets" would be cancelled by public disclosure strongly suggests that Exemption 7 would have been denied in *Reporters Committee* if the Department of Justice had the same deliberate public disclosure practices the NLRB has here. Reed submits that under *Reporters Committee*, the NLRB's disclosure of *Excelsior* lists forfeits any exemption under Exemption 6 based upon the claim that the Agency is protecting the "privacy" of listed individuals.

The Decision Below Conflicts With The Eleventh Circuit's Decision in *Ray*

The decision below conflicts with the decision of the Eleventh Circuit in *Ray v. United States Department of State*.[30] As relevant here, Ray made a FOIA request of the United States Department of State for the names and addresses of certain Haitian individuals who had been deported from the United States. It was contended that the the U.S. government was deporting Haitians in the face of potential retaliatory persecution by the Haitian government, that Federal officials had made inaccurate public statements about the persecution threat, and that, if the U.S. government were fulfilling its responsibility, many Haitians would not have been deported. The Eleventh Circuit

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[29] *Id.* at 1473-74 n.10 (emphasis added).

[30] 908 F.2d 1549 (11th Cir. 1990). As indicated at n.34, *infra*, the Eleventh Circuit's decision in *Ray* is presently before this Court on certiorari.

concluded that the FOIA plaintiffs "seek the redacted information so that they can contact directly the Haitians who were interviewed by American officials and question them about how they are treated by the Haitian government."[31] That identifying information had been redacted by the Department from documents partially disclosed on grounds that FOIA Exemption 6 justified nondisclosure.

Both the District Court and the Court of Appeals disagreed with the State Department's claim that Exemption 6 warranted nondisclosure of the redacted names and addresses. In denying that Exemption 6 applies, the Circuit Court found that "the identifying information will give the plaintiffs a means to obtain 'public interest' information in that they can then locate the Haitian returnees and inquire about how they were treated after they were returned to Haiti."[32] Exemption 6 was denied, and disclosure ordered.

Thus, there is a direct conflict between *Ray* and the decision below as to whether Exemption 6 justifies nondisclosure of the names and addresses of individuals in the government's posession. As we show below, Reed has a governmental scrutiny interest in *Excelsior* list names and addresses at least as substantial as the plaintiffs' comparable interests in *Ray*. Indeed, the facts of the instant case more persuasively oppose application of Exemption 6 than those in *Ray*, for in *Ray* "the returnees were promised confidentiality before they talked with U.S. government officials,"[33] whereas no pledge of confidentiality was given *Excelsior* listed persons. Indeed, *Ray* is analytically much more difficult a case than Reed's, for in *Ray* there is not the slightest indication that the government actually had disclosed the

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[31] *Id.* at 1554.

[32] *Id.* at 1555.

[33] *Id.* at 1554.

requested names and addresses to other members of the public, as the Stipulation here conclusively establishes occurs under *Excelsior*.

This Court has granted certiorari to review the Eleventh Circuit's decision in *Ray* "limited to Question 1 presented by the petition."[34] Question 1 in the *Ray* certiorari petition is: "Are names and other information identifying individual Haitian citizens who consented to be interviewed by State Department personnel protected against mandatory disclosure by FOIA Exemption 6, which applies to matters 'the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,' . . . ?"[35] Reed submits that as certiorari has been granted in *Ray* on Question 1, certiorari should also be granted in this case. The facts contained in the Stipulation with respect to the circumstances under which *Excelsior* lists are compiled and distributed here raise Exemption 6 questions far more serious and substantial than those found in *Ray*.

The Decision Below Conflicts With The FOIA's Language And Purposes

Standing alone, the instant case presents significant questions concerning the rights of members of the public to obtain information under the FOIA which are worthy of this Court's consideration. For the Stipulation indisputably shows: 1) Reed is not being treated as "any person" under the FOIA, on an equal footing with "any [other] person" in the NLRB's selective disclosure of *Excelsior* lists; and 2.) the assertion that individuals have a "privacy interest" in nondisclosure, in the face of the Stipulation, is entirely spurious. The stark comparison between the FOIA's provisions and the NLRB's practices and procedures, as sanctioned by the decision below, justify review. For, if those

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[34] 59 U.S.L.W. 3598 (Mar. 4, 1991).

[35] 59 U.S.L.W. 3435 (Dec. 18, 1990).

practices and procedures stand, despite the FOIA, other Federal agencies can be expected to indulge in equivalent discriminations and spurious FOIA defenses.

Even if the decision below were not generalized to other Federal agencies, but confined to *Excelsior* practices and procedures administered by the NLRB, the impact is substantial. As noted above, the Court of Appeals' decision grants categorical nondisclosure to all *Excelsior* lists.[36] That result for 1988 alone, the last year in which the NLRB published an Annual Report, would deny disclosure of *Excelsior* lists involved in large numbers of cases. "The 1988 total [NLRB representation and related petitions received] consisted of 6092 petitions that the NLRB conduct secret-ballot elections where workers select or reject unions to represent them in collective bargaining; 1256 petitions to decertify existing bargaining agents; 165 deauthorization petitions for referendums on rescinding a union's authority to enter into union-shop contracts; . . ."[37] The *Excelsior* lists of concern to the instant case involve representation, decertification, and deauthorization elections.[38]

The FOIA's Disclosure Purpose

The FOIA's dominant purpose in public disclosure is well known. There is no need here to present the extensive citations on the point because we believe that the NLRB does not, and could not, dispute the general disclosure purposes of the statute. It should suffice to cite this Court's statement in *Robbins Tire*: "As we have repeatedly emphasized, 'the Act is broadly

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[36] App. at 5a-6a.

[37] *53rd Annual Report of the National Labor Relations Board, for the Fiscal Year Ended September 30, 1988*, at 10, reprinted as an extra edition by Labor Law Reports (CCH) on May 16, 1990.

[38] Stip., ¶ 2, App. 10a-11a.

conceived,' and its 'basic policy' is in favor of disclosure."[39] Thus, unless the NLRB can establish the validity of its application of Exemption 6 to the facts contained in the Stipulation, Reed is entitled to the documents requested, as the Agency has admitted that the documents are within its possession.[40]

The Agency Has The Burden Of Proof

The FOIA, itself, provides that the NLRB has the burden of proof. That burden requires a convincing showing that the documents requested are exempt from disclosure. The NLRB's determination adverse to disclosure must receive *de novo* review. For, in a FOIA case, "the court shall determine the matter de novo . . . and the burden is on the agency to sustain its action."[41]

The Agency Cannot Discriminate In Selecting Recipients Of Documents

It is clear from the Stipulation that the NLRB makes untethered disclosure of the *Excelsior* lists to labor organizations in election campaigns. In fact, the NLRB imposes no limitations upon use,[42] photocopying,[43] or distribution[44] of the lists.

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[39] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978) (citations omitted).

[40] Stip., ¶ 6 F, App. 12a. This is particularly true, as here, in Exemption 6 cases. *Cochran v. United States*, 770 F.2d 949, 956 (11th Cir. 1985).

[41] FOIA, 5 U.S.C. § 552 (a)(4)(B).

[42] The Agency does not condition labor organizations' receipt of *Excelsior* lists upon an agreement to use the lists solely to communicate with employees in the election campaign.

Neither does the Agency require that the *Excelsior* lists be returned to the Agency or the employer that generated them.

Indeed, the Agency does not, with respect to *Excelsior* lists, employ the typical safeguards provided "name and address" lists where *legitimate* privacy interests are asserted and consistently protected. For example, the Agency does not require that communications be mailed, rather than delivered by personal house-to-house visits, or that mailings be through a neutral mailing house.[45]

Even more fundamentally however, the Agency does not secure the permission of *Excelsior* list employees to disclose their names and addresses to the labor organizations, or, for that matter, to anyone at all. In these circumstances, where nothing is done by the Agency to protect the supposed "privacy" interests of *Excelsior* list employees (and, indeed, the lists are compiled for the express purpose of invasions of privacy), the rules of estoppel and waiver should firmly be applied,[46] and the claimed Exemption 6 disallowed.

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[43] The Agency does not condition labor organizations' receipt of *Excelsior* lists upon an agreement that the lists will not be reproduced, or, being reproduced, that all copies will be returned at the conclusion of the election campaign.

[44] The Agency does not condition labor organizations' receipt of *Excelsior* lists upon an agreement that the lists will not be distributed to other organizations or individuals, or, for that matter, not sold as "mailing lists" to brokers of such lists.

[45] The use of a neutral mailing house, in similar circumstances, was approved by *Sheldon v. O'Callaghan*, 497 F.2d. 1276, 1282 (2d Cir.), *cert. denied*, 419 U.S. 1090 (1974).

[46] We conclude that the most salient governing principles are in cases such as *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir 1982) (emphasis added). ("*Disclosure is inconsistent with confidentiality*, and courts need not permit hide-and-seek manipulation of confidences in order to foster candor.")

Reed's FOIA Request Is Rooted In Learning The Impact Of The NLRB's Practices And Policies

Reed acknowledges the basic purpose of the FOIA, which is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[47] That purpose is entirely consistent with Reed's goals in this litigation, goals which stem from the NLRB's abject failures to administer the NLRA and accurately advise employees of their rights under that statute as declared by this Court.[48]

Two decisions of this Court are central to Reed's concern. They are *Pattern Makers' League v. NLRB*,[49] and *Communications Workers v. Beck*.[50] *Pattern Makers* holds that employees under the NLRA need not be members of the labor organization that is the bargaining representative with their employer. *Beck* holds that nonmembers of the bargaining representative cannot be compelled to pay "dues" or "dues-equivalent" amounts to the bargaining representative, but only a *pro rata* share of the costs of negotiating and enforcing the bargaining agreement. Both cases vitally impact employees' rights under the NLRA. And, of importance here, both cases directly and profoundly implicate the Agency's administration of the NLRA.

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[47] *Robbins Tire*, 437 U.S. at 242.

[48] We recognize that Reed need not show the reasons he seeks disclosure. These facts, however, show the public's interest in disclosure and the relationship of the *Excelsior* lists to the NLRB's stewardship of the NLRA.

[49] 473 U.S. 95 (1985).

[50] 487 U.S. 735 (1988).

However, as the publication *An Investigation of Government Disinformation* ("*Investigation*")[51] shows, the NLRB, on a basis that can accurately be described as pandemic, repeatedly misleads persons making inquiries of the Agency. The Agency systematically indicates that employees can be required to be "members," despite *Pattern Makers*, and that employees can be compelled to pay "dues" or "dues-equivalent" amounts, despite *Beck*.[52] Moreover, Agency forms, which are universally employed by the Agency in the conduct of the very elections for which *Excelsior* lists are produced, also misrepresent employees' obligations and rights under *Pattern Makers* and *Beck*.[53] Thus, there can be no question that Reed's concerns are within the FOIA disclosure purposes.[54]

As determined in *Ray*, "identifying information [i.e., names and addresses] will give the plaintiffs a means to obtain 'public interest' information . . . ."[55] Disclosure here would provide Reed with the means to obtain "public interest" information concerning the NLRB's fulfillment of its stewardship of the NLRA under *Beck* and *Pattern Makers*. First, Reed concludes that, in the NLRB's default, private-sector endeavors should be

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[51] Exh. 1 to Plaintiff's Motion for Summary Judgment, District Court Document 6.

[52] The *Investigation* is verified by the affidavit of Frank Crumbley, a private investigator who performed the investigation, and whose affidavit is Appendix A thereto.

[53] Copies of those forms, which highlight the Agency's misrepresentations, are contained in unnumbered pages in Appendix B to the *Investigation*.

[54] Since the order entered below, the NLRB has modified the election forms that, in part, led to Reed's FOIA request. Even now, however, the modified forms, while improved, do *not* remove all ambiguities which cause employees uncertainties about their rights.

[55] 908 F.2d at 1555.

undertaken to provide employees with accurate information, so that rights under the Act can knowledgeably be protected. Second, Reed believes that, while the skeleton of the NLRB's defaults under *Beck* and *Pattern Makers* is known, the impact upon employees can be intuited but not confirmed without contacting the employees involved.

Production of the *Excelsior* lists would have two salutary public effects, advising employees of their rights under this Court's decisions, and, to the extent employees wish to respond to inquiry, providing documentation for the impact of actions of the NLRB upon employees in NLRB conducted elections. For these reasons, Reed submits that the Court of Appeals was plainly wrong in concluding that disclosure of the *Excelsior* lists "would reveal nothing about the Board's conduct of representation proceedings or its performance of any other statutory duty."[56]

Reed's FOIA Request Does Not Include Privacy Data

Reed's FOIA request is solely for the names and addresses of employees on *Excelsior* lists. We leave aside here further discussion of the fact that, due to the Agency's prior publication of the lists, the information contained in them is not reasonably or properly viewed as "privacy" information at all. We do emphasize that the *Excelsior* lists sought do not contain confidential data similar to that contained in medical records. Reed does not seek information as to the employees' birthdates, employment records, traffic or criminal records, marital history, or even whether they are male or female. And, more to the point, Reed does not ask whether the *Excelsior* list employees voted in the election, or, if they voted, how they cast their ballot in the NLRB conducted elections. The sum of the *Excelsior* lists is the employees' names and addresses. Thus, the information

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[56] App. at 5a.

sought by Reed is unlike the "rap sheets" protected in *Reporters Committee*.

Exemption 6 Is Inapplicable To The Stipulated Facts

Exemption 6 provides that the general disclosure sections of the statute do "not apply to matters that are . . . personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." On its own terms, that section does not apply here, for it clearly contemplates nondisclosure only of personal data that has not deliberately been disclosed previously. Obviously, an "unwarranted invasion of personal privacy" can occur only where the Agency has consistently protected the "files" from disclosure in the past. In the case of the "files" of concern to this case, the Agency has *not* protected the names and addresses on the *Excelsior* lists from disclosure. Instead, it has provided those lists without restriction on the copying of them, or their use or distribution. As a result, the Agency has not, and cannot sustain(ed) its burden of proof with respect to the provisions of this section.

In that respect, the instant case is much like *Southern Utah Wilderness Alliance, Inc. v. Hodel*.[57] In *Hodel*, the FOIA request was made for the names and addresses of persons who signed use permits and trailhead registers in the National Parks. The court, after "balancing" applicable factors, found that Exemption 6 does not apply. Specifically, the court found, in the circumstances, that "it is difficult to be certain that any significant invasion of privacy is involved," that disclosure "carries no opprobrium and is hardly even a private matter," that the agency "has not taken any precaution to assure privacy at the time the information was obtained," and that "Exemption 6 does not take into account unsubstantiated speculation about possible secondary effects that

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[57] 680 F. Supp. 37 (D.D.C. 1988).

may follow release."[58] In conclusion, the court noted that it "has pursued the traditional balancing exercise, but in fact the considerations here are so weighted in favor of disclosure that this full review was unnecessary."[59] So, too, are the facts "so weighted in favor of disclosure" in the instant case.

The United States Court of Appeals for the District of Columbia Circuit subsequently vacated *Hodel* as moot because "[s]ubstantially all of the material requested by appellee was disclosed by the appellant and no meaningful relief can be provided by this court."[60] In other words, *Hodel* was rendered moot because the government disclosed the lists.

The "threshold criterion governing applicability of FOIA Exemption 6 is that the information be contained in personnel medical or similar files."[61] It is indisputable on the face of the Stipulation that the *Excelsior* lists cannot meet that criterion.[62]

CONCLUSION

For the foregoing reasons, certiorari should be granted to review the decision of the United States Court of Appeals for the

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[58] *Id.* at 39.

[59] *Id.* at 40.

[60] No. 88-5142 (D.C. Cir. Nov. 15, 1988).

[61] *Fund for Constitutional Gov't v. National Archives*, 656 F.2d 856, 863 (D.C. Cir. 1981).

[62] Highly persuasive in this regard is the analysis in *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971). As *Getman* specifically concerns *Excelsior* lists, we commend the entire case to the Court's consideration. In so doing, we recognize that, though not reversed in its own subsequent history, *Getman* is not followed insofar as it "balanced" individual interests rather than the public interests favoring disclosure.

District of Columbia Circuit denying Reed's request for the production of *Excelsior* lists on grounds that Exemption 6 justifies nondisclosure where the Stipulation of the Parties establishes that the Agency has not protected "privacy" interests said to justify nondisclosure and Reed has demonstrated the public interest in having the lists disclosed to the public.

Respectfully submitted,

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June 13, 1991

APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

March 15, 1991

[927 F.2d 1249]
Rex H. REED, Appellant,

v.

NATIONAL LABOR RELATIONS BOARD, et al., Appellees.

No. 90-5147.

United States Court of Appeals,
District of Columbia Circuit.

Argued Jan. 31, 1991.
Decided March 15, 1991.

Before MIKVA, Chief Judge, and EDWARDS and THOMAS, Circuit Judges.

Opinion for the Court filed by Chief Judge MIKVA.

MIKVA, Chief Judge:

This case requires us to decide whether *Excelsior* lists, which the National Labor Relations Board (the "NLRB" or "Board") obtains from employers and distributes to unions in representation proceedings, may be disclosed to the public through the Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552 (1988). We conclude that the lists are protected from disclosure under Exemption 6 of the Act, and affirm the district court's entry of summary judgment for the Board.

I.

Appellant Rex Reed requested that the NLRB disclose copies of *Excelsior* lists in representation cases closed after January 1, 1984, preferably limited to elections won by unions in states without right-to-work laws. *Excelsior* lists refer to the Board's practice of requiring employers involved in pending

representation elections to submit a list containing the names and addresses of all employees eligible to vote, which the Board then makes available to the organizing unions. *Excelsior Underwear, Inc.*, 156 N.L.R.B 1236 (1966); *see NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969).

The Board's FOIA officer denied Reed's request for the *Excelsior* lists, concluding that they were protected under Exemptions 6 and 7(C) of the Act. Exemption 6 allows agencies to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," while under Exemption 7(C) agencies may withhold "records or information compiled for law enforcement purposes" to the extent that production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §§ 552(b)(6), (7)(C). After the Board's Acting General Counsel denied his appeal, Reed filed a complaint in the district court.

On cross motions by the parties, the district court entered summary judgment for the Board, concluding that Exemption 6 protected the *Excelsior* lists from disclosure. *See Reed v. NLRB*, Memorandum Opinion and Order (D.D.C. May 15, 1990) 1990 WL 136647 [hereinafter *Order*]. The court found that (1) the lists constituted "similar files" within the meaning of Exemption 6; (2) the listed employees possessed a viable privacy interest in their names and addresses, even where the lists had previously been disclosed to parties in representation cases; and (3) there was no public interest in disclosure, given that the lists would reveal "little or nothing about" the NLRB's conduct. *Order* at 2-4. The court did not reach the Board's alternative argument that Exemption 7(C) also protected the lists from disclosure.

II.

In reviewing the district court's entry of summary judgment for the Board, we must first "be sure that the district court has not overlooked or impermissibly resolved any disputed material facts; and second, we must ensure that the judge correctly applied

the relevant law to these undisputed facts." *Abourezk v. New York Airlines, Inc.*, 895 F.2d 1456, 1458 (D.C. Cir. 1990); *accord Sherwood v. Washington Post*, 871 F.2d 1144, 1145 (D.C. Cir. 1989). As the facts of this case are not in dispute, we focus here on the propriety of the district court's application of controlling legal precedents.

A threshold question is whether *Excelsior* lists—which contain the names and addresses of all employees eligible to vote, sometimes broken down by employment area or job category—constitute "similar files" within the meaning of Exemption 6. *See* 5 U.S.C. § 552(b)(6) (protecting "personnel and medical files and similar files"). Interpreting the legislative history of Exemption 6, the Supreme Court has instructed lower courts to construe the phrase "similar files" broadly, and to apply the exemption to any "Government records on an individual which can be identified as applying to that individual." *See United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 601-02, 102 S.Ct. 1957, 1961, 72 L.Ed.2d 358 (1982) (citation omitted). Accordingly, decisions of this and other circuits have found names and addresses of individuals, like the *Excelsior* lists at issue here, to be "similar files." *See, e.g., National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989) [hereinafter *NARFE*] (noting that "NARFE does not dispute that the names and addresses of recent annuitants are covered by the phrase"), *cert. denied*, _ U.S. _, 110 S.Ct. 1805, 108 L.Ed.2d 936 (1990); *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 728 F.2d 1270, 1273 (9th Cir. 1984) (finding that *Excelsior* lists constitute "similar files"); *Wine Hobby USA, Inc. v. IRS*, 502 F.2d 133, 135 (3d Cir. 1974) (names and addresses of federally registered wine producers are "similar files").

The next step under Exemption 6 involves identifying the relevant privacy interests in nondisclosure and the public interests in disclosure, and determining "whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy." *NARFE*, 879 F.2d at 874. The district court correctly concluded that employees possess a legitimate privacy interest in their names and addresses. *See Order* at 3. Reviewing an association's

request for the names and addresses of retired federal employees, we recently held that "the privacy interest of an individual in avoiding the unlimited disclosure of his or her name and address is significant." *NARFE*, 879 F.2d at 875. *See also Federal Labor Relations Auth. v. U.S. Dep't of the Treasury*, 884 F.2d 1446, 1452 (D.C. Cir. 1989) (reaffirming *NARFE*'s privacy holding in context of current federal employees), *cert. denied*, _ U.S. _, 110 S.Ct. 864, 107 L.Ed.2d 948 (1990); *Wine Hobby USA*, 502 F.2d at 137 (noting that an "individual may fervently wish [her home address] to remain confidential").

Reed nonetheless contends that the NLRB's prior disclosure of *Excelsior* lists to unions during representation proceedings and the Board's failure to place restrictions on the unions' use of the lists undermine the significance of the individuals' asserted privacy interests. As the district court recognized, however, the Supreme Court has expressly rejected such a "cramped notion of personal privacy," affirming "the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 1476, 1478, 103 L.Ed.2d 774 (1989) [hereinafter *Reporters Committee*]. Although *Reporters Committee* addressed Exemption 7(C), the Court noted the similarity of the inquiry under Exemption 6, *see id.* 109 S.Ct. at 1472-73, 1479; indeed, we have previously found the case controlling in the Exemption 6 context, *see NARFE*, 879 F.2d at 874. Reed's attempt to limit the employees' privacy interest in *Excelsior* lists simply cannot overcome the language and holding of *Reporters Committee*.

Reporters Committee also controls our analysis of the countervailing public interest in disclosure of *Excelsior* lists. The Supreme Court explained that only "[o]fficial information that sheds light on an agency's performance of its statutory duties" merits disclosure under FOIA, and noted that "disclosure of information about private citizens that is accumulated in various governmental files" would "reveal[] little or nothing about an agency's own conduct." *Reporters Committee*, 109 S.Ct. at 1481. *See also NARFE*, 879 F.2d at 879 (noting that "unless the public

would learn something directly about the workings of the *Government*," there is no public interest in disclosure (emphasis in original)). The *Excelsior* lists at issue here contain exclusively private information and would reveal nothing about the Board's conduct of representation proceedings or its performance of any other statutory duty. *See also Getman v. NLRB*, 450 F.2d 670, 680 (D.C. Cir. 1971) (*Excelsior* lists "do not in any direct sense reveal anything about the Board's operations"). *Cf. Ray v. U.S. Dep't of Justice*, 908 F.2d 1549, 1556 (11th Cir. 1990) (concluding that INS interview reports would reveal "what our government is doing and saying regarding Haitians who unsuccessfully attempt to flee to this country").

Reed nonetheless asks us to find a public interest in disclosure because he plans to use the *Excelsior* lists to correct allegedly widespread misrepresentations the Board has made to employees concerning compulsory union membership and dues requirements. Again, we remind Reed that we are an intermediate court, bound by the Supreme Court's unequivocal declaration in *Reporters Committee* that the identity and purpose of the requesting party are *irrelevant* under FOIA. *See Reporters Committee*, 109 S.Ct. at 1480 (disclosure "cannot turn on the purposes for which the request for information is made," and, except in cases involving privilege, "the identity of the requesting party has no bearing on the merits of" a FOIA request).

Left, then, to balance a viable privacy interest against a nonexistent public interest, we agree with the district court that disclosure of the *Excelsior* lists would constitute an unwarranted invasion of personal privacy. *NARFE*, 879 F.2d at 879 ("We need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time."). Moreover, following the Supreme Court's instruction in *Reporters Committee* that "individual circumstances [may be] disregarded when a case fits into a genus in which the balance characteristically tips in one direction," 109 S.Ct. at 1483, we conclude that Exemption 6 protects *Excelsior* lists as a category—not merely those lists sought here by Reed. Indeed, the categorical nature of our holding flows directly from our analysis under Exemption 6; the

balancing test we are instructed to administer contains no room for individualization or consideration of specific circumstances. *See NARFE*, 879 F.2d at 879 (Exemption 6 protects category of federal annuitants).

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Although the district court did not reach the question whether *Excelsior* lists are also protected from disclosure under Exemption 7(C), the Board urges this as an alternative disposition. Given our affirmance of the district court's Exemption 6 holding, we need not remand for consideration of Exemption 7(C). In any event, we are skeptical that *Excelsior* lists, obtained by the Board pursuant to routine pre-election procedures—not as part of a specific investigation into potential unfair labor practices—satisfy the threshold requirement of Exemption 7(C) that they be "compiled for law enforcement purposes." *See Birch v. U.S. Postal Serv.*, 803 F.2d 1206, 1209-10 (D.C. Cir. 1986) (for agencies performing both law enforcement and administrative functions, only "investigations which focus directly on specifically alleged illegal acts" are covered by Exemption 7); *Committee on Masonic Homes of R. W. Grand Lodge v. NLRB*, 556 F.2d 214, 218-19 (3d Cir. 1977) (finding that union authorization cards were not "compiled for law enforcement purposes," and stating that "'law enforcement purposes' must relate to some kind of formal proceeding, and one that is pending").

III.

For the foregoing reasons, we conclude that *Excelsior* lists are protected from disclosure under FOIA Exemption 6, and affirm the district court's entry of summary judgment for the Board.

It is so ordered.

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

May 15, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Rex H. Reed, Plaintiff, v. National Labor Relations Board, Defendant.	Civil Action No. 89-3254 FILED MAY 15, 1990 JAMES E. DAVEY, Clerk

ORDER

Ever since the National Labor Relations Board's ("NLRB") decision in Excelsior Underwear Inc., 156 NLRB 1236 (1966), employers have been required to submit to the NLRB lists of employees eligible to vote in forthcoming union representation elections for use by unions prior to election proceedings.[1] These lists are commonly referred to as Excelsior lists. The above-captioned suit arises out of a Freedom of Information Act ("FOIA") request that plaintiff made to the NLRB for "copies of Excelsior lists in cases closed from January 1, 1984 to the present."[2] The NLRB withheld the requested Excelsior lists from plaintiff pursuant to FOIA Exemptions 6 and 7(C). 5 U.S.C. §§ 552(b)(6) and 552(b)(7)(C).

Now before the Court is a motion for summary judgment by the defendant. Upon consideration of defendant's motion, the supporting and opposing legal memoranda, and the underlying

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[1] In addition to the names of employees, Excelsior lists also include employees' addresses and places of employment.

[2] Plaintiff's Complaint for Declaratory and Injunctive Relief, Exhibit A.

law, the Court concludes that defendant is entitled to summary judgment on its Exemption 6 claim. Since the Court concludes that defendant is entitled to withhold the requested Excelsior lists pursuant to Exemption 6, the Court need not address defendant's Exemption 7(C) claim.

Exemption 6 permits an agency to withhold "personnel and medical and similar files the disclosure of which would constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). In determining whether Exemption 6 pertains to particular information, the Court's task is "to balance the right of privacy of affected individuals against the right of the public to be informed; and the statutory language 'clearly unwarranted' instructs the court to tilt the balance in favor of disclosure." Getman v. National Labor Relations Board, 450 F.2d 670, 674 (D.C. Cir. 1971).

As a threshold matter, the Court must determine whether the requested Excelsior lists are contained within personnel, medical, or similar files. Congress did not intend to limit Exemption 6 "to a narrow class of files containing only a discrete kind of personal information. Rather, '[t]he exemption [was] intended to cover detailed records on an individual which can be identified as applying to that individual.'" United States Department of State v. Washington Post Co., 456 U.S. 595, 602 (1982) (citations omitted). The United States Court of Appeals for this Circuit has held on numerous occasions that the names and addresses of individuals can be identified as applying to particular individuals and, therefore, are similar files within the meaning of Exemption 6. See, e.g., National Ass'n of Retired Federal Employees v. Horner ("NARFE"), 879 F.2d 873, 874 (D.C. Cir. 1989), cert. denied, 58 U.S.L.W. 3657 (1990).

"[T]he privacy interest of an individual in avoiding the unlimited disclosure of his or her name and address is significant." Id., 879 F.2d at 875. Plaintiff, however, argues that the privacy interests of the individuals mentioned on the requested Excelsior lists is undercut by virtue of the NLRB's disclosure of these lists to labor organizations and the NLRB's failure to place any

restrictions on the labor organizations' use or duplication of the lists. The Court disagrees with plaintiff. Cases construing the FOIA have "recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public." United States Department of Justice v. Reporters Committee for Freedom of the Press, 109 S. Ct. 1468, 1479 (1989). As such, the Court must balance the privacy interests of the individuals mentioned in the requested Excelsior lists against the public's interest in their disclosure.

In evaluating the public's interest in disclosure, the Supreme Court has held that it is necessary to examine "'the nature of the requested document and its relationship to the "basic purpose of [FOIA] to open agency action to the light of public scrutiny." '" Id., 109 S. Ct. at 1481 (quoting Department of Air Force v. Rose, 425 U.S. 352 (1976)). The purpose of the FOIA is in no way furthered by "the disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." Id.

The Excelsior lists which plaintiff is seeking "themselves do not in any direct sense reveal anything about the [NLRB's] operations." Getman, 450 F.2d at 680. Because the Excelsior lists do not shed any light on what the NLRB is up to, there is no public interest in their disclosure. As such, the Court "need not linger over the balance; something, even a modest privacy interest, outweighs nothing every time." NARFE, 879 F.2d at 879.

Accordingly, it is, by the Court, this 15 day of May, 1990,

ORDERED that summary judgment shall be, and hereby is, entered in favor of defendant on its Exemption 6 claim; and it is

FURTHER ORDERED that the above-captioned case stands dismissed from the dockets of this Court.

/s/
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

STIPULATION OF THE PARTIES, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

February 15, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REX H. REED

Plaintiff,

v.

Civil Action No. 89-3254
(Judge Charles R. Richey)

NATIONAL LABOR
RELATIONS BOARD, et al.

Defendants.

STIPULATION OF THE PARTIES

Rex H. Reed, plaintiff, through counsel, and the National Labor Relations Board, et al., also through counsel, pursuant to the Consent Order entered by this Court on January 22, 1989, hereby submit the following stipulation of facts which provide the basis for the cross-motions for summary judgment the parties will submit according to the same Consent Order.

Stipulated Facts

1) The defendants are an agency of the Federal government within the meaning of the Freedom of Information Act, 5 U.S.C. Section 552 et seq.

2) The defendant National Labor Relations Board (NLRB) is created by the National Labor Relations Act ("Act"), 29 U.S.C. Section 151 et seq. to, among other things, administer the election provisions of the Act (29 U.S.C. 159), under which employee interest in representation by a labor organization (certification elections), continued representation by the incumbent certified or recognized labor organization (decertification elections), and the labor organization's right to continue to collect representation fees under a "union security" arrangement

(deauthorization elections) are determined by employees' vote in secret ballot elections conducted by the NLRB.

3) In administering the election provisions of the Act, the NLRB has delegated the conduct of representation matters, including elections, to the General Counsel, also a defendant herein. Generally, in accordance with Board Rules and Regulations (29 C.F.R. 102.60) representation petitions for elections are filed in the appropriate Board Regional Office. In accordance with the Act (29 U.S.C. 3(d)), the General Counsel exercises general supervision over the officers and employees in the Board's Regional Offices.

4) Generally, after the Agency directs an election or approves an election agreement, the Board's Excelsior rule takes effect. (Excelsior Underwear, Inc., 156 NLRB 1236, 61 LRRM 1217 (1966)). The Excelsior rule requires that the employer of the petitoned-for unit prepare an election eligibility list containing the names and addresses of all eligible voters. The names and addresses should be listed systematically, i.e. either alphabetically or by department or unit. The employer must file the list with the Regional Director within seven days of the direction or approval. The Regional Director then makes this list available to all parties in the election proceeding. This list will normally be used as the voting list, unless the parties agree on changes in resolving eligibility issues.

5) The purpose of the Excelsior list is to facilitate communication in order to insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote. The Excelsior list is also designed to avoid the necessity of a challenge to a voter based solely on the union's lack of knowledge of his/her identity.

6) As the Act is administered for purposes of elections:

A) Eligible employees are not given individual notice that their names and addresses are being furnished to the NLRB and then to the labor organization(s). However, notice of the

Excelsior rule's requirements is set forth in the Regional Director's Decision and Direction of Election and the Stipulated Election Agreement approved by the Regional Director, which are public documents.

B) Generally eligible employees cannot have their names and addresses deleted from the Excelsior list furnished to the Board and then to the labor organization(s).

C) The parties receive the Excelsior lists after the Decision and Direction of Election or after the approval of a Stipulated Election Agreement. Once the parties have the list, the defendants do not limit the time, place, and manner within which the labor organizations can use the Excelsior lists to communicate with the employees.

D) Normally, the defendants do not limit the subject matter concerning which the labor organizations can use the Excelsior lists to communicate with the employees. If, however, unfair labor practice charges or objections to an election are filed, the defendants may review the content of these communications.

E) The defendants do not limit the number of copies the labor organization(s) can make of the Excelsior lists, nor do they limit the labor organization(s)' distribution of the Excelsior lists.

F) The defendants retain custody of the original eligibility list. In accordance with its Casehandling Rules, the Agency does not at any time, once the Excelsior list has been distributed, seek the return of the Excelsior list from the labor organization(s) which were parties to the election. Nor does the Agency assist an employer in obtaining copies of the Excelsior list that may have been made.

7) The plaintiff, on August 3, 1989, by letter addressed to John C. Truesdale, Executive Secretary of the NLRB, initiated

his request for Excelsior lists under the Freedom of Information Act (FOIA). (That letter is Exhibit A, attached to Complaint).

8) The defendants, on August 25, 1989, denied plaintiff's request by letter from John W. Hornbeck, Freedom of Information Officer, to Hugh L. Reilly, plaintiff's counsel. (That letter is Exhibit B, attached to Complaint.)

9) The plaintiff, on September 14, 1989, appealed the denial of the FOIA request by letter to Joseph E. DeSio, Acting General Counsel for NLRB. (That letter is Exhibit C, attached to Complaint.)

10) The defendants, on September 28, 1989 denied the appeal of the denial of the FOIA request by letter from Mary M. Shanklin, Director of NLRB General Counsel's Office of Appeals. (That letter is Exhibit D, attached to Complaint.)

11) The plaintiff filed this lawsuit to contest the validity of the denial of his FOIA request by the defendants on December 4, 1989.

Approval by Counsel

This Stipulation has been seen and approved by counsel for the plaintiff and the defendants as follows:

/s/
Hugh L. Reilly, Bar No. 137612

Attorney for the Plaintiff
National Right to Work Legal
Defense Foundation, Inc.
8000 Braddock Road
Springfield, VA 22160
(703) 321-8510

/s/
Margery E. Lieber
Abby Simms, Bar No. 913640
Attorneys for the Defendants
National Labor Relations
Board
1717 Pennsylvania Ave.,N.W.
Washington, D.C. 20570
(202) 634-1729
(202) 254-6216

[h:reed.dms]

APPENDIX D

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, WITH ATTACHED EXHIBITS, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

December 4, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Rex H. Reed 1819 Saint Boniface Street Vienna, VA 22180 Plaintiff, v. National Labor Relations Board 1717 Pennsylvania Avenue, N.W. Washington, D.C. 20570 & Joseph E. DeSio, Acting General Counsel 1717 Pennsylvania Avenue, N.W. Washington, D.C. 20570	)	Civil Action No. 89-3254

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF
(Freedom of Information Act)

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (West 1989), to require the defendants to permit access to certain records within their possession or control.

2. This Court has jurisdiction over this action and venue is proper pursuant to 5 U.S.C. § 552 (a)(4)(B).

3. The Plaintiff, Rex H. Reed, is a citizen of the United States, a resident of the Commonwealth of Virginia, and a

member of the public entitled to submit a request and obtain records under FOIA.

4. The Defendant, National Labor Relations Board (NLRB), is an agency of the federal government created by § 3(a) of the National Labor Relations Act (NLRA), 29 U.S.C. § 153(a) (West 1989). The Defendant, Joseph E. DeSio, is Acting General Counsel of the NLRB; the Office of the General Counsel (General Counsel) is an agency of the federal government created by § 3(d) of the NLRA, 29 U.S.C. § 153(d) (West 1989). The NLRB and the General Counsel have possession or control of the records to which the Plaintiff seeks access.

5. On August 3, 1989, on behalf of the Plaintiff, a letter was sent to the NLRB requesting copies of lists of employees produced by employers in elections conducted by the NLRB under § 9(c) of the NLRA, 29 U.S.C. § 159(c) (West 1989) to determine whether employees wish to be represented for purposes of collective bargaining with their employer by a labor organization which would become their "exclusive representative" under § 9(a) of the NLRA, 29 U.S.C. § 159 (a) (West 1959). (Plaintiff's letter is attached to this Complaint as Exhibit A.) Such lists are produced by employers under the so-called Excelsior doctrine, named after a principle established in Excelsior Underwear, Inc., 156 NLRB 1236 (1966). Under NLRB procedures, the lists are distributed to all parties to a representation election. NLRB Casehandling Manual, § 11312.1 c. And, pursuant to an explicit provision in the Casehandling Manual, the NLRB takes no action "to secure the return of the list." Casehandling Manual, § 11312.11.

6. Plaintiff's Exhibit A letter was forwarded by the NLRB to the NLRB General Counsel for response. Pursuant to delegations from the NLRB to the General Counsel concerning representation elections, the General Counsel has responsibility for responding to FOIA requests made to the NLRB with respect to election matters. An agent of the General Counsel, John W. Hornbeck, FOIA Officer, responded to Plaintiff's request by

letter of August 25, 1989. (Exhibit B hereto.) Mr. Hornbeck denied the Plaintiff's request totally.

7. On September 14, 1989, Plaintiff appealed the denial of his FOIA request to the General Counsel. (Exhibit C.) The agent of the General Counsel, Mary M. Shanklin, Director of the Office of Appeals, responded to Plaintiff's appeal by letter of September 28, 1989. (Exhibit D.) Ms. Shanklin denied the Plaintiff's appeal totally.

8. Pursuant to 5 U.S.C. § 552 (a)(3), Plaintiff is entitled to access to the requested agency records, which the Defendants do not deny exist within their possession or control. There is no legal basis for the Defendants' refusal to furnish the records requested.

WHEREFORE, Plaintiff prays that the Court: (1) require the Defendants to permit Plaintiff access to all the requested records, (2) provide for expeditious proceedings in this action as required by 5 U.S.C. § 552 (a)(4)(d); (3) award Plaintiff his costs and reasonable attorneys' fees in this action; and (4) grant such other and further relief as the Court may deem just and proper.

/s/

Hugh L. Reilly, Bar No. 137612
Attorney for the Plaintiff
National Right To Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

[Logo omitted in printing]

National Right to Work
Legal Defense Foundation

(established in 1968)

August 3, 1989

John C. Truesdale,
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Re: Excelsior Lists

Dear Mr. Truesdale:

This is to request, pursuant to the Freedom of Information Act, 5 U.S.C. 552, and Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971), copies of Excelsior lists in cases closed from January 1, 1984 to the present. If possible, we would limit the request to those states not having Right-to-Work laws and elections where union won. If that is not possible, our request covers Excelsior lists in all cases closed in the period. To the extent we can, we would like to conform the request to the Board's record retrieval system.

We intend to seek a waiver of the costs of photocopying on the basis of 5 U.S.C. 522 (a)(4)(A)(iii) because "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of government and is not primarily in the commercial interest [of the Foundation]." However, if there is substantial expense to the agency, we will agree to pay the reasonable search and photocopying expenses incurred in compliance with

[address block omitted in printing]

EXHIBIT A

this request, under protest, and subject to later challenge, if that course will expedite our receipt of the materials requested.

As you know, the Foundation is a legal-aid organization which supports legal assistance to employees who are, in some way, victims of compulsory unionism. You may know that the Foundation is a tax exempt charity under Sec. 501 (c)(3) of the Internal Revenue Code.

In working with employees nationwide, Foundation attorneys have been repeatedly confronted with vast ignorance of employees' rights under the National Labor Relations Act and the United States Constitution. In some instances, that ignorance seems to be caused by a lack of information. In other cases, employee ignorance on these subjects appears to result from deliberately misleading provisions ostensibly authorized by Sec. 8 (a)(3) of the Act. Indeed, the NLRB itself has many notices and publications that are, to say the very least, hopelessly outdated. In summary, there is a profound need for someone to inform employees of their rights in these areas so important to their daily working lives. On the default of employers, unions, and arguably the NLRB, the Foundation intends to fulfill this function. The Excelsior lists will be used for that purpose.

Thank you for your cooperation in the expeditious handling of this request, I remain

Sincerely,

/s/

Hugh L. Reilly
Staff Attorney

[Logo omitted in printing]

UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

August 25, 1989

Hugh L. Reilly, Staff Attorney
National Right to Work
Legal Defense Foundation
8001 Braddock Road
Springfield, VA 22160

Dear Mr. Reilly:

This is in response to your letter of August 3, 1989 to John C. Truesdale, Executive Secretary. That letter was forwarded to this office for response on August 18, 1989, and was received by us on that date. In your letter you request, pursuant to the Freedom of Information Act, 5 U.S.C. Section 552, and Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971), copies of Excelsior lists in cases closed from January 1, 1984, to the present. You further state that, if possible, you wish to limit your request to those cases arising in states not having Right-to-Work laws and to cases in which the election was won by a union.

I conclude that the documents you seek are exempt from disclosure by Exemptions 6 and 7(C) of the Freedom of Information Act, 5 U.S.C. Section 552(b)(6) and (7)(C), since they consist entirely of information personal to individuals--names and addresses--and since I find that you have submitted no consideration which would overcome the privacy rights of the affected individuals.

EXHIBIT B

Exemption 6 privileges from disclosure all information about individuals in "personnel and medical files and similar files" if its disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. Section 552(b)(6). As a threshold matter, it is settled that the phrase "similar files" is to have a broad rather than narrow meaning, and that all information that "applies to a particular individual" qualifies for Exemption 6 consideration. U.S. Dept. of State v. Washington Post Co., 456 U.S. 595, 599-603 (1982). Names and addresses plainly can be identified as applying to particular individuals and, therefore, are "similar files" within the meaning of Exemption 6. See, e.g., Van Bourg, Allen, Weinberg & Roger v. NLRB, 728 F.2d 1270, 1273 (9th Cir. 1984); Heights Community Congress v. Veterans Administration, 732 F.2d 526, 529 (6th Cir. 1984).

There is a clear privacy interest in the names and addresses contained in a Board Excelsior list. The importance of privacy in one's home is manifest. As the court noted in Wine Hobby USA, Inc. v. United States, IRS, 502 F.2d 133, 136-137 (3rd Cir. 1974), "... there are few things which pertain to an individual in which his privacy has traditionally been more respected than his own home." Accord: Heights Community Congress, 732 F.2d at 529. Any disclosure of individuals' names and addresses could subject those individuals to unwanted mailings and personal solicitations even though they "may fervently wish ... [their addresses] to remain confidential ...." Wine Hobby, 502 F.2d at 137. Thus, unwanted solicitations are a form of harassment and an invasion of privacy. Moreover, the Supreme Court now has made clear that documents required to be disclosed under the FOIA to one requester must be disclosed to all. U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, __ U.S. __, 109 S.Ct. 1468, 1480-1481 (1989). Therefore, an individual's privacy interests in this information must be measured by the potential for harassment if the information were to be released to any and all members of the general public. Accordingly, I find that there is a clear privacy interest in the names and addresses of employees contained in a Board Excelsior list. I further find that the limited disclosure that those names and addresses receive when released to the parties to a Board election is insufficient to defeat

those privacy interests. Reporters Committee, 109 S.Ct. at 1476-1477 ("... information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public'").

I turn now to consideration whether there is any public interest to be served by your request that would outweigh the individuals' privacy interests. Initially, it appears that the public may have an interest in ascertaining whether and to what extent the Board or its employees are providing inaccurate information to the public. For, the "core purpose" of the FOIA is to "shed light on an agency's performance of its statutory duties," Reporters Committee, 109 S.Ct. at 1482, and thus "focuses on the citizens' right to be informed about 'what their government is up to.'" Id. at 1481, quoting from Department of the Air Force v. Rose, 425 U.S. 352, 360-361 (1976). That "core purpose," however, "is not fostered by disclosure of information about private citizens ... that reveals little or nothing about an agency's own conduct." Reporters Committee, 109 S.Ct. at 1481. Here, the names and addresses of individual employees eligible to vote in certain elections from 1984 to date will reveal nothing about the manner in which the Board conducts elections or the manner in which it disseminates information respecting employees' statutory rights. Thus, your request "does not intend to discover anything about the conduct of the agency that has possession of the requested records [and a] response to this request would not shed any light on the conduct of any Government agency or official." See Id. at 1481.

I further conclude that the documents you seek are privileged from disclosure by Exemption 7(C). This exemption protects from mandatory disclosure "records or information compiled for law enforcement purposes to the extent that production of such records could ... constitute an unwarranted invasion of personal privacy." 5 U.S.C. Section 552(b)(7)(C). There are "law enforcement purposes" underlying representation proceedings sufficient to bring them within the coverage of Exemption 7. Wellman Industries, Inc. v. NLRB, 490 F.2d 427, 430 (4th Cir.), cert. denied, 419 U.S. 834 (1974); Red Food

Stores, Inc. v. NLRB, 604 F.2d 324 (5th Cir. 1979). But see Getman v. NLRB, 450 F.2d at 673. Moreover, the privacy interest analysis that supports application of Exemption 6 to protect the information you seek applies with even greater force to the balancing under Exemption 7(C). For, "[u]nlike Exemption 6, which permits nondisclosure only when a document portends a 'clearly unwarranted invasion of personal privacy,' Exemption 7(C) does not require a balance titled emphatically in favor of disclosure." Stern v. FBI, 731 F.2d 84, 91 (D.C. Cir. 1984), quoting Bast v. Dept. of Justice, 665 F.2d 1251, 1254 (D.C. Cir. 1981).

In sum, I deny your request on the basis that there is a clear privacy interest in the names and addresses of individuals contained in Board Excelsior lists and that you have not shown that disclosure of those names and addresses would further the "core purpose" of the FOIA of "ensur[ing] that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed." Reporters Committee, 109 S.Ct. at 1482.

In denying your request, I am mindful that two courts previously have required the production of Excelsior lists under the FOIA. Getman v. NLRB, 450 F.2d 670, and Van Bourg v. NLRB, 728 F.2d 1270. However, I conclude that those decisions have been implicitly overruled in this regard by the Supreme Court in Reporters Committee, 109 S.Ct. 1468. In both of those cases the courts relied heavily on the particular purpose for which the documents were being sought in assessing the public's interest in disclosure. This approach now has been squarely rejected by the Supreme Court. Reporters Committee, 109 S.Ct. at 1481. Moreover, the court in Getman acknowledged that its decision "should not be understood to compel the Board in the future to give out Excelsior lists to all other applicants, and for other elections." 450 F.2d at 677, n. 24. Now that the Supreme Court has made clear that neither "the identity of the requesting party" nor the "particular purpose" to which the document will be put has any bearing on a FOIA request for information about

individuals, 109 S.Ct. at 1480-1481, we cannot be compelled to disclose these lists to you unless we are similarly compelled to disclose them to any member of the general public under any circumstances. Such disclosure would undermine "the public and private interests [that] are balanced by the Board through its 'Excelsior Rule,' " and would thereby "effectively circumvent the Excelsior Rule" under which such lists are provided to unions only after they have demonstrated "sufficient employee interest." Local 3, IBEW, AFL-CIO v. NLRB, 845 F.2d 1177, 1181 (2nd Cir. 1988).

Finally, because I have denied your request in its entirety, it is unnecessary to rule upon your request for a fee waiver with respect to the costs of photocopying documents.

The undersigned is responsible for the determination that the documents you have requested are privileged from disclosure under the Freedom of Information Act. You may obtain a review of this determination under the provisions of Section 102.117(c)(2)(ii) of the Board's Rules by filing an appeal with the General Counsel, National Labor Relations Board, Washington, D.C. 20570, within 20 days (excluding Saturdays, Sundays and legal holidays) from the receipt of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Sincerely,

/s/

John W. Hornbeck
Freedom of Information Officer
Telephone: (202) 254-9350

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National Right to Work
Legal Defense Foundation

(established in 1968)

September 14, 1989

Joseph E. DeSio,
Acting General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Re: Excelsior Lists

Dear Mr. DeSio:

On August 3, 1989, by letter to John C. Truesdale, Executive Secretary (copy attached herto) I requested copies of Excelsior lists in closed cases from January 1, 1984 to the present. This request was made pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. § 552. Because of delegations of authority from the Board to the General Counsel concerning representation matters, Mr. Truesdale forwarded my letter to John W. Hornbeck, Freedom of Information Officer, for reply.

Mr. Hornbeck replied on August 25, 1989 (copy also attached hereto). As near as we can determine, our request is denied for two reasons: 1) we have not established that the information requested is directed to insuring that "the Government's activities be opened to the sharp eye of public scrutiny"; and 2) furnishing the Excelsior lists would constitute an invasion of the personal privacy of employees on the lists. We will take these points in turn.

[address block omitted in printing]

EXHIBIT C

1
Government's Activities

It is true that our letter of request does identify several interests we have in obtaining the Excelsior lists. It is not true, however, that we do not include scrutiny of government activities, particularly of the handling of representation cases, in our request. Though we intended our letter to be polite, we do there say, "the NLRB itself has many notices and publications [concerning employees' § 7 and § 8 (a) (3) rights] that are, to say the very least, hopelessly outdated." (Letter of August 3, p. 2.) On that same page, we refer to the "arguabl[e]" default of the NLRB in these areas. Thus, among other reasons, our letter specifies scrutiny of the activities of government, specifically the NLRB, as justifying the request.

Not to belabor the point, but to make it absolutely clear, I am enclosing a copy of An Investigation of Government Disinformation. I will not recite its contents because I conclude from BNA reports that you are familiar with them. However, the connection between what the employees are advised by the NLRB and how voting rights are exercised is so clear and direct that no elaboration is needed. Manifestly, the request is made, in primary part, to determine the impact facts of the nature revealed by the disinformation investigation have upon employees' exercise of statutory rights. Inarguably, the purpose of disclosure is primarily scrutiny of the activities of government, and well within the "core purposes" of the Freedom of Information Act.

2
Employees' Privacy

We are puzzled by the Agency' assertion of supposed "privacy" interests of employees on the Excelsior lists as justification for refusing the request. The Representation proceedings part of the Case Handling Manual, ¶ 11312.1 a., states, "In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to

vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them." Clearly, the communication contemplated is by private parties to the election, not the NLRB, itself.

Indeed, the NLRB does not treat the lists as "confidential." The contents of the communications of the parties with Excelsior list employees are not restricted, monitored, or reviewed in any way to insure that they are directed solely to the election. Once turned over to parties, Excelsior lists are available for unlimited communications on any subject. In fact, the NLRB does nothing to acquire and return Excelsior lists to the employer once an election is completed; ¶ 11312.11 says, quite clearly, "the regional director should not take any action, either on his/her own motion or that of the employer, to secure return of the list." (Emphasis added.)

Any inquiry we address to employees would in all liklihood be less intrusive, not more intrusive, than the communications received during the election. In both cases, of course, the recipient of mail need not open it, or, upon opening, can disregard it. And our inquiry could, unless returned to sender, probably be made in one mailing, rather than the multiple and repeated communications made in an election context. In any event, the mere receipt of unsolicited mail is not properly viewed as an invasion of personal privacy; otherwise the sender would be required to secure the recipient's permission to use the postal service in every instance.

Conclusion

For the foregoing reasons, we appeal the denial of our Freedom of Information Act request. The reasons for denial are not in accord with the facts, and are, we believe, frivolous. Contrary to Mr. Hornbeck's letter, we have shown that our request is grounded in scrutiny of the activities of the Agency. In addition, the "privacy" interests invoked to deny the request have more intrusively been invaded by the process that elicits the Excelsior lists in the first place. Moreover, the NLRB itself does

not protect the privacy interests of Excelsior list employees once the lists have been furnished to parties to elections. Therefore, the initial determination to deny the Freedom of Information Act request contained in my letter of August 3 should be reversed, and the lists should be furnished, as requested.

Sincerely,

/s/

Hugh L. Reilly
Staff Attorney

[Logo omitted in printing]

UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

September 28, 1989

Hugh L. Reilly, Esq.
National Right to Work
Legal Defense Foundation
8001 Braddock Road
Springfield, Virginia 22160

Re: FOIA Appeal
Excelsior Lists

Dear Mr. Reilly:

Your appeal from the refusal of the Freedom of Information Officer to provide documents you had requested has been carefully considered.

The appeal is denied substantially for the reasons set forth in the letter of August 25, 1989, from the FOIA Officer. Contrary to the contentions on appeal, individuals named in Excelsior lists have a privacy interest in their names and addresses and you have submitted no consideration sufficient to overcome the privacy rights of the affected individuals.

Mary M. Shanklin, at the direction of and pursuant to the policies established by the Acting General Counsel, Joseph E. DeSio, is responsible for the determination that the requested information is exempt from disclosure under the FOIA.

EXHIBIT D

Judicial review of this determination may be obtained by filing a complaint in the District Court of the United States in the district in which the complainant resides, or in which the records are situated, or in the District of Columbia, as provided in the FOIA, 5 U.S.C. Section 552(a)(4)(B).

Very truly yours,

Joseph E. DeSio
Acting General Counsel

By /s/
Mary M. Shanklin, Director
Office of Appeals

cc: FOIA Officer

APPENDIX E

ANSWER TO COMPLAINT, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

December 20, 1989

MARGERY E. LIEBER
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 634-1729

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REX H. REED 1819 Saint Boniface Street Vienna, VA 22180	:	
Plaintiff,	:	
v.	:	Civil Action No. 89-3254 (CRR)
NATIONAL LABOR RELATIONS BOARD 1717 Pennsylvania Avenue, N.W. Washington, D.C. 20570	:	
and	:	
JERRY M. HUNTER, General Counsel, 1717 Pennsylvania Avenue, N.W. Washington, D.C. 20570	:	
Defendants.	:	

ANSWER TO COMPLAINT

The National Labor Relations Board, and Jerry M. Hunter, General Counsel of the National Labor Relations Board, 1/ by their Assistant General Counsel for Special Litigation, answer Plaintifff's Complaint as follows:

1. Admit the allegations of Paragraph 1.

2. Admit the allegations of Paragraph 2.

3. The defendants admit that as a member of the public the plaintiff is entitled to submit a request and obtain non-exempt records under the Freedom of Information Act (5 U.S.C. 552) ("FOIA"). Answering further, the defendants have insufficient knowledge upon which to form a belief as to the truth of the remainder of paragraph 3.

4. The defendants admit that the National Labor Relations Board is an independent agency of the United States created by section 3(a) of the National Labor Relations Act (29 U.S.C. 153 (a) ("Act"), and that the defendants have possession or control over the documents sought. Defendants deny that Joseph E. DeSio is now Acting General Counsel and further, aver that Jerry M. Hunter is now the General Counsel of the National Labor Relations Board. Defendants also deny that the Office of the General Counsel is a separate agency of the federal government created by Section 3(d) of the Act. Rather, it is an office within the National Labor Relations Board, which is an independent regulatory agency of the government.

5. The defendants admit that on August 3, 1989, the plaintiff made a request for documents under the FOIA, and

---

1/ Jerry M. Hunter was confirmed as the General Counsel of the National Labor Relations Board on November 28, 1989. See Rule 25 (d)(1) of the Federal Rules of Civil Procedure.

further aver that the letter speaks for itself. (See Plaintiff's Complaint, Exhibit A). Defendants further admit to the existence of the Excelsior doctrine, and that pursuant to NLRB Casehandling Manual Section 11312.1, the lists are distributed to all parties to a representation election. The defendants further admit that NLRB Casehandling Manual Section 11312.11 provides, in part, that the NLRB should take no action "to secure the return of the list."

6. Admit the allegations in Paragraph 6, except that the defendants deny that the General Counsel has exclusive responsibility for responding to FOIA requests made to the NLRB with respect to election matters.

7. Admit the allegations in Paragraph 7.

8. Deny the allegations in Paragraph 8. The defendants further aver that plaintiff is not entitled to access to the requested agency records and that agency records were not improperly withheld from the plaintiff.

9. The defendants deny that the plaintiff is entitled to any of the relief requested in the plaintiff's prayer. The defendants answer further noting that 5 U.S.C. 552 (a)(4)(D), relied upon by the plaintiff in its prayer for relief was repealed, Pub. L. 98-620, Title IV, 402(2), Nov. 8, 1984, 98 Stat. 3356, 3357.

AFFIRMATIVE DEFENSES

1. The documents sought by the Plaintiff's FOIA request are exempt from compelled disclosure under the FOIA, 5 U.S.C. 552(b)(6) and (7)(C).

2. Even if Plaintiff should prevail on the merits of any part of its suit, Plaintiff is not entitled to attorneys' fees or other litigation costs under the FOIA, 5 U.S.C. 552(a)(4)(E).

3. Plaintiff is not entitled to any relief.

WHEREFORE, the National Labor Relations Board, and Jerry M. Hunter, General Counsel of the National Labor Relations Board deny that the Plaintiff is entitled to any relief and pray that the Court dismiss the Complaint in its entirety.

Respectfully submitted,

/s/

Margery E. Lieber
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570
Telephone: (202) 634-1729

Co-counsel: Abby Propis Simms
Telephone: (202) 254-6216
Bar No. 913640

Dated at Washington, D. C.
this 20th day of December, 1989

[t:rexans.aps]

APPENDIX F

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

March 1, 1990

MARGERY E. LIEBER
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Telephone: (202) 634-1729

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REX H. REED Plaintiff,	:	
	:	Civil Action No.
v.		89-3254 (CRR)
	:	
NATIONAL LABOR RELATIONS BOARD,	:	
and	:	
JERRY M. HUNTER, General Counsel, Defendants.	:	

DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 108(h) and for the reasons set forth in the attached memorandum, the National Labor Relations Board, et al., defendants herein request this Court grant them summary judgment.

WHEREFORE, the defendants pray this Court enter an order granting them summary judgment.

Respectfully submitted,

/s/

Margery E. Lieber
Assistant General Counsel
for Special Litigation
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Telephone: (202) 634-1729

Co-counsel: Abby Propis Simms
Telephone: (202) 254-6216
D.C. Bar No. 913640

Dated: Washington, D.C.
March 1, 1990.

[h:reedmot.dms]

APPENDIX G

PLAINTIFF'S OPPOSITION TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND SUPPORTING POINTS AND AUTHORITIES, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

March 22, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REX H. REED,

Plaintiff

v.

Civil Action No. 89-3254
(Judge Charles R. Richey)

NATIONAL LABOR
RELATIONS BOARD, et al.

Defendants

PLAINTIFF'S OPPOSITION TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND SUPPORTING POINTS AND AUTHORITIES

The plaintiff herein, Rex H. Reed, through counsel, and pursuant to the schedule established by the Consent Order entered by this Court on January 22, 1990[3], submits the following points and authorities in opposition to the motion for summary judgment filed by the National Labor Relations Board (NLRB or Agency) defendants.

* * * *

Conclusion

Based upon the Stipulation and the applicable law, the Defendants' Motion should be denied. It is clear that the Excelsior lists are obtained by the NLRB and distributed without obtaining the permission of listed employees to distribute their names and addresses; that the NLRB does nothing (apart from

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[3] Hereinafter "Consent Order."

possible unfair labor practice case sanctions in cases initiated by others) to limit or control the subject matter or frequency of communications to employees by persons obtaining the lists from the NLRB; and that the NLRB does not limit or control the distribution of the Excelsior lists, even after their ostensible election purpose has expired. There is, then, to use the NLRB's term, no "viable" privacy interest in the Excelsior lists from the outset, and none of the FOIA exemptions the NLRB claims applies at the threshold.

In addition, through the Disinformation Study, Plaintiff Reed has amply demonstrated the public interest in disclosure of the Excelsior lists. Scrutiny of the NLRB's conduct is at the core of his FOIA requests. On the record here, Plaintiff Reed has done more than simply assert his concerns, he has show that those concerns are based upon facts verified by the Study. As a result, his FOIA requests do vitally concern scrutiny of the operations of the NLRB, an agency of government, and are well within FOIA's general disclosure purposes, and not exempt on any theory advanced by the NLRB.

Respectfully submitted,

/s/

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APPENDIX H

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING POINTS AND AUTHORITIES, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

March 1, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REX H. REED,

Plaintiff

v.

Civil Action No. 89-3254
(Judge Charles R. Richey)

NATIONAL LABOR
RELATIONS BOARD, et al.

Defendants

PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND SUPPORTING POINTS
AND AUTHORITIES

The plaintiff, Rex H. Reed (Reed), moves for summary judgment on his claim that documents he requested of the defendants, National Labor Relations Board (NLRB) and the NLRB General Counsel (herein collectively agency), pursuant to the Freedom of Information Act (FOIA)[4] must be produced. The motion is made pursuant to F.R.Civ. P. 56, the FOIA, itself, and controlling precedents of the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit. Plaintiff's motion should be granted for the following valid reasons:

* * * *

REQUEST FOR ORAL ARGUMENT

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[4] 5 U.S.C. § 552 (West 1989).

The plaintiff, Rex H. Reed, requests oral argument on this motion.

[Certificate of Service omitted in printing]

/s/
Hugh L. Reilly

APPENDIX I

REPLY MEMORANDUM OF POINTS AND AUTHORITIES OF THE NATIONAL LABOR RELATIONS BOARD TO THE CROSS-MOTION FOR SUMMARY JUDGMENT, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

March 22, 1990

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REX H. REED Plaintiff,	:	
	:	Civil Action No.
v.		89-3254 (CRR)
	:	
NATIONAL LABOR RELATIONS BOARD,	:	
and	:	
JERRY M. HUNTER, General Counsel, Defendant.	:	

REPLY MEMORANDUM OF POINTS AND AUTHORITIES OF THE NATIONAL LABOR RELATIONS BOARD TO THE CROSS-MOTION FOR SUMMARY JUDGMENT

In accordance with the January 22, 1990 Consent Order of this Court, the National Labor Relations Board and Jerry M. Hunter, General Counsel, hereby file their reply to Plaintiff's motion for summary judgment and supporting points and authorities:

* * * *

CONCLUSION

For the foregoing reasons, and for the reasons stated in our memorandum in support of motion for summary judgment, the defendants respectfully request that this Court grant their motion for summary judgment.

Respectfully submitted,

/s/

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Dated: Washington, D.C.
March 22, 1990

[H:reedreply.aps]

(2)

No. 90-1915

Supreme Court, U.S.
FILED
AUG 16 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

REX H. REED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether lists of employees' names and addresses, which the National Labor Relations Board obtains from employers and gives to unions participating in representation proceedings, are protected from disclosure to the public under Exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. 552 (b)(6).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1915

REX H. REED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 927 F.2d 1249. The order of the district court (Pet. 7a-9a) is not yet reported.

JURISDICTION

The opinion of the court of appeals was entered on March 15, 1991. The petition for a writ of certiorari was filed on June 13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Rex H. Reed filed a request with the National Labor Relations Board under the Freedom of Information Act (FOIA), 5 U.S.C. 552, for copies

of the "*Excelsior* lists" compiled in representation cases closed after January 1, 1984. Pet. App. 1a. An *Excelsior* list is a compilation of the names and addresses of all employees eligible to vote in a pending representation election. The Board requires employers to submit such a list in advance of an election and makes the list available to the unions participating in the election. The Board distributes *Excelsior* lists to ensure that all eligible voters have the opportunity to be informed of the issues before exercising their statutory right to vote, and to avoid challenges to voters based on the union's lack of knowledge of their identities. *Id.* at 11a; *see also Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969).

The Board's FOIA officer denied Reed's request in its entirety, concluding that *Excelsior* lists are exempt from disclosure under FOIA Exemptions 6 and 7(C), 5 U.S.C. 552(b)(6) and 7(C), "since they consist entirely of information personal to individuals—names and addresses—and since [the FOIA officer] found that [petitioner] * * * submitted no consideration which would overcome the privacy rights of the affected individuals." Pet. App. 19a. The Acting General Counsel of the Board denied Reed's appeal. *Id.* at 28a-29a.

2. Reed then filed a complaint in the district court pursuant to 5 U.S.C. 552(a)(4)(B). On cross-motions by the parties, the district court entered summary judgment for the Board based on FOIA Exemption 6, 5 U.S.C. 552(b)(6), which protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Pet. App. 7a-9a. The court found that *Excelsior* lists constitute

"similar files" within the meaning of Exemption 6; the listed employees possess a viable privacy interest in their names and addresses, even though the lists had previously been disclosed to parties in representation cases; and there is no public interest in disclosure, since the lists "themselves do not in any direct sense reveal anything about the [NLRB's] operations." *Id.* at 9a, quoting *Getman* v. *NLRB*, 450 F.2d 670, 680 (D.C. Cir. 1971).[1]

3. The court of appeals affirmed the decision of the district court. Initially, the court of appeals agreed that *Excelsior* lists are "similar files" within the meaning of Exemption 6 since they are "[g]overnment records on an individual which can be identified as applying to that individual." Pet. App. 3a, citing *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 601-602 (1982). The court of appeals also agreed that employees possess a legitimate privacy interest in their names and addresses, and that the significance of the individuals' privacy interests was not undermined by the Board's "prior disclosure of *Excelsior* lists to unions during representation proceedings and [its] failure to place restrictions on the unions' use of the lists." Pet. App. 4a. The court explained that in *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*), this Court had recognized "the privacy interest inherent in the nondisclosure of certain information

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[1] The court did not reach the Board's alternative argument that Exemption 7(C), 5 U.S.C. 552(b)(7)(C), also protects the lists from disclosure. Exemption 7(C) excludes from the disclosure requirement records compiled for law enforcement purposes, "but only to the extent that the production of such [materials] * * * could reasonably be expected to constitute an unwarranted invasion of personal privacy."

even where the information may have been at one time public." Pet. App. 4a, quoting *Reporters Committee*, 489 U.S. at 767.

The court of appeals further concluded that *Reporters Committee* also controls the analysis of the public interest in disclosure of *Excelsior* lists, which petitioner claims outweighs the employees' privacy interests. The court noted that in *Reporters Committee* this Court had explained that only "[o]fficial information that sheds light on an agency's performance of its statutory duties" merits disclosure under FOIA, and the "disclosure of information about private citizens that is accumulated in various governmental files" would generally "reveal[] little or nothing about an agency's own conduct." Pet. App. 4a, quoting *Reporters Committee*, 489 U.S. at 773. Applying that standard, the court of appeals held that there was no public interest in the disclosure of *Excelsior* lists, since they "contain exclusively private information and would reveal nothing about the Board's conduct of representation proceedings or its performance of any other statutory duty." Pet. App. 5a. Nor, in the court's view, was a different conclusion required because Reed "plans to use the *Excelsior* lists to correct allegedly widespread misrepresentations the Board has made to employees concerning compulsory union membership and dues requirements." *Ibid.* An argument of that sort fails under *Reporters Committee*, the court of appeals stated, because the Supreme Court made clear in that case that "the identity and purpose of the requesting party are *irrelevant* under FOIA." Pet. App. 5a, citing 489 U.S. at 771.

Balancing "a viable privacy interest against a nonexistent public interest," the court of appeals

agreed with the district court that disclosure of the *Excelsior* lists would constitute a clearly unwarranted invasion of personal privacy. Pet. App. 5a. Moreover, following this Court's instruction in *Reporters Committee* that "individual circumstances [may be] disregarded when a case fits into a genus in which the balance characteristically tips in one direction," 489 U.S. at 776, the court of appeals concluded that Exemption 6 protects *Exceisior* lists as a category—not merely those lists sought by petitioner. Pet. App. 5a.[2]

ARGUMENT

1. Exemption 6 of FOIA, 5 U.S.C. 552(b)(6), protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Petitioner's basic contention is that, even if *Excelsior* lists constitute "similar files" within the meaning of Exemption 6, the courts below erred in concluding that, on balance, disclosure of *Excelsior* lists would work "a clearly unwarranted invasion of personal privacy." Petitioner does not dispute that many persons choose to limit disclosure of their home addresses in order to avoid being contacted at home, but contends that the Board has "waived" the employees' privacy interest by turning the lists over to unions without placing any restrictions on their use of the lists. Petitioner also contends that any remaining privacy interest is outweighed by his "public interest" purpose of providing employees with

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[2] Given its affirmance of the district court's Exemption 6 holding, the court of appeals found it unnecessary to remand for consideration of the Board's alternative contention that the *Excelsior* lists were also protected from disclosure under Exemption 7(C). Pet. App. 6a.

accurate information as to their rights under the NLRA. Pet. 17-21.

We believe that the courts below correctly rejected those contentions in light of the principles enunciated in this Court's decision in *Reporters Committee*. In *Reporters Committee*, the Court held that the disclosure of criminal "rap sheets" to journalists would constitute an unwarranted invasion of privacy under Exemption 7(C).[3] The Court recognized "the individual interest in avoiding disclosure of personal matters," and rejected the "cramped notion" that some public disclosure of personal information obliterates any interest in avoiding further disclosure. 489 U.S. at 762-763. The Court explained that "both the common law and literal understandings of privacy encompass the individual's control of information concerning his or her person" (*id.* at 763), and that "our cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public." *Id.* at 767, citing *Department of Air Force* v. *Rose*, 425 U.S. 352 (1976).[4]

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[3] The Court noted that the language employed to protect privacy under Exemption 7(C) differs from that found in Exemption 6, so that "the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law-enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files." 489 U.S. at 756. However, the Court recognized that the analytic framework for the evaluation of privacy invasions under both Exemption 6 and Exemption 7(C) is the same. 489 U.S. at 768-769. Petitioner agrees. Pet. 12 n.25.

[4] As noted above, the Board releases *Excelsior* lists only to unions participating in scheduled representation elections. While the Board does not put any restrictions on the partici-

In addition to making clear that individuals may retain a privacy interest in personal information that has been made public, the Court in *Reporters Committee* also reiterated that "whether disclosure of a private document * * * is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny." 489 U.S. at 772 (internal quotations omitted). Thus, while there is a public interest in the disclosure of information that directly reveals the government's conduct of its affairs, "[t]hat purpose * * * is not fostered by disclosure of information about private citizens that is accumulated in various government files but reveals little or nothing about an agency's own conduct." *Id.* at 773. Therefore, as the Court also stated, "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." *Id.* at 765. Since the lists of employee names and addresses that petitioner seeks do not, by themselves, reveal anything about the Board's conduct of its affairs, the lists are protected by Exemption 6.

2. Although the court of appeals reached the correct result in this case, it is appropriate for this Court to hold the petition while *United States Dep't of State* v. *Ray*, cert. granted, No. 90-747 (Mar. 4, 1991), is pending.

At issue in *Ray* is whether the State Department must disclose names and other information identify-

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pants' use of the lists, there is no evidence that the lists have been used by unions or other parties in a way that would defeat the privacy interests of the employees named on the lists. Indeed, if the lists "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to" them. *Reporters Committee*, 489 U.S. at 764.

ing certain Haitian citizens who consented to be interviewed by State Department personnel after they were returned from this country to Haiti, or whether such information is protected against mandatory disclosure by Exemption 6. In *Ray*, the respondent argues that even though the information he seeks has no discernible public interest in and of itself, it should be disclosed because he can use the information to locate persons who were returned to Haiti by the United States and inquire about how they were treated after they were returned. Thus, he intends to make a "derivative use" of the information to determine whether the State Department correctly determined that the persons the United States returned to Haiti had not been harassed by the Haitian government.

In our view, disclosure cannot be required on the basis of a derivative use theory. But even if it could be, disclosure would not be warranted in this case for the primary reason petitioner advances, which is that "the NLRB, on a basis that can accurately be described as pandemic, repeatedly misleads persons making inquiries of the Agency." Pet. 20. Thus, it appears that petitioner "plans to use the *Excelsior* lists to correct allegedly widespread misrepresentations the Board has made to employees concerning compulsory union membership and dues requirements." Pet. App. 5a. Such an argument is insufficient, even under a derivative use theory, because petitioner does not allege that he plans to use the lists to determine how the Board has been conducting its affairs, and it is clear that private information would be protected where it does not reveal "what the[] government is up to" (*Reporters Committee*, 489 U.S. at 773), either directly or derivatively.

However, petitioner also argues that he intends to use the *Excelsior* lists to study the Board's activities. He explains that "while the skeleton of the NLRB's defaults * * * is known," he is not entirely certain of the extent of the Board's alleged malfeasance, and must contact employees to confirm his accusations. Pet. 21; see Pet. App. 25a. That argument illustrates that it is difficult to find a logical limit to the derivative use theory, since it is possible to claim that almost any information in government files can be used to check whether the government is performing its duties properly. But since petitioner has advanced a derivative use argument similar to the argument made by the respondent in *Ray*, reconsideration of the decision below might be necessary if the Court disagrees with our submission in that case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's decision in *United States Dep't of State* v. *Ray*, No. 90-747.

Respectfully submitted.

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AUGUST 1991

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